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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-378

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs-Appellants,

—against—

JEROME A. AMBRO, Supervisor, RICHARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc.,

Defendants-Respondents.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK ENTERED UPON AN ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK ENTERED UPON AN ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants, Robert Maldini, Rose Maldini, Fred Aprea, Blanche R. Aprea, John Simpson and Nina Simpson, appeal from a judgment of the Supreme Court, Suffolk County, State of New York, entered upon on Order of the Court of Appeals, State of New York, affirming a judgment entered in the Supreme Court, Suffolk County, State of New York, upon an Order of the Appellate

Division, Second Department, State of New York, affirming a judgment of the Supreme Court, Suffolk County declaring and holding as constitutional a portion of the zoning ordinance of the Town of Huntington.

Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

Opinion Below

The Opinion of the Court of Appeals of the State of New York is reported at 36 N.Y. 2d 481, 369 N.Y.S. 2d 385 and is set forth in Appendix A, *infra*, p. 1a. The Appellate Division affirmed the Supreme Court, Suffolk County, without opinion. The opinion of the Supreme Court, Suffolk County, is set forth in Appendix E, *infra*, p. 20a.

Jurisdiction

This action was brought in the Supreme Court, Suffolk County, against the Town of Huntington, by the plaintiffs-Appellants, together with the other plaintiffs named in the title, for a declaratory judgment that the amendment to the Town Building Zone Ordinance entitled "Retirement Community District", was unconstitutional, and to enjoin the Town of Huntington from establishing such District as an Amendment to the Town's Building Zone Ordinance and from permitting or authorizing the use of any lands for such district.

The Defendant-Appellee, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., owner of a parcel zoned as such a District, intervened in the action as a Defendant.

The Supreme Court, Suffolk County, entered a judgment declaring the zoning ordinance constitutional. Plaintiffs-Appellants appealed this judgment to the Appellate Division, Second Department, which affirmed the Supreme Court, without opinion, 43 A.D. 2d 664, 349 N.Y.S. 2d 646. Plaintiffs-Appellants appealed this judgment to the Court of Appeals, which affirmed the Appellate Division, two judges dissenting.

The appeal to this Court lies under 28 U.S.C. Sec. 1257(2) from a final judgment entered upon a decision of the Court of Appeals of the State of New York, wherein the question of the validity of a State statute as being repugnant to the Constitution of the United States was considered and the decision of the Court of Appeals upheld the validity of such statute. A municipal ordinance qualifies as a "state statute" under section 1257(2): *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Poulos* v. *State of New Hampshire*, 345 U.S. 395 (1953); *Breard* v. *City of Alexandria*, 341 U.S. 622 (1951).

Relevant Ordinance Provisions

Building Zone Ordinance of the Town of Huntington
Chapter 62, S. 49.01 R-RM

RETIREMENT COMMUNITY DISTRICT

"USE REGULATIONS: In the R-RM residence District a building or premises shall be used only for the following purposes:

(1) Any use permitted in the R-80 Residence District.*

---

* One family residences on two acre minimum lots, farms, churches, schools, libraries and certain low density municipal uses.

(2) Multiple residences designed to provide living and dining accommodations, including social, health care, or other supportive services and facilities for aged persons, to be owned and operated by a nonprofit corporation organized for such purposes under the laws of the State of New York.

(3) Any accessory use or structure permitted in the R-80 Residence District subject to the same limitations and restrictions enumerated in Section 62-4.1A."

Question Presented

WHETHER a town board may constitutionally restrict the use of land solely for the benefit of a class of persons by creating a land use classification based upon age or other category of person owning, operating or using the land.

Statement of the Case

Plaintiffs-Appellants are owners of single family residences purchased between 1957 and 1967, situated on one acre parcels in the Dix Hills area of the Town of Huntington. With respect to residences, the area is restricted by the Town zoning ordinance to one family homes on one acre minimum lots.

In 1964 and 1965, Defendant-Appellee purchased approximately twenty (20) acres in the center of this one acre zone and at its specific request the Town then adopted in 1966 a new land use classification for the use of "aged persons" to be owned and operated only by a non-profit corporation organized in the State of New York, permitting multiple dwellings of up to fourteen (14) units per acre, entitled "Retirement Community District". The Town then immediately granted Defendant-Appellees' application to rezone its twenty (20) acres to such Retirement District.

In September, 1968, Plaintiffs commenced an action in the Supreme Court, Suffolk County, against the Town of Huntington, to declare the said ordinance unconstitutional, illegal and void and to permanently enjoin the Town from authorizing the use of Defendant-Appellee's land for such district. Thereafter, in 1969, Defendant-Appellee Health Care Agencies, was permitted to intervene as a Defendant.

Plaintiffs moved for summary judgment on two grounds: (1) the creation of a retirement district using age and ownership by non-profit New York corporations as the zoning factor violated the equal protection clause of the Fourteenth Amendment; and (2) the change of zone of Defendant's parcel to retirement district did not conform to the Town's Comprehensive Plan. The Supreme Court granted Plaintiffs' motion for summary judgment on the ground the change of zone did not conform to the Town's Comprehensive Plan and, found, therefore, it unnecessary to decide the constitutional issue. Opinion of the Court, Appendix G, p. 30a.

The Town did not appeal from the judgment. Appendix H, p. 40a. The Defendant-Appellee, Health Care Agencies, appealed from the judgment and on appeal, the Appellate Division, Second Department, reversed and remanded the action for trial. Judgment, Appendix I, p. 43a.

After trial, the Supreme Court found the ordinance in full accord with the United States Constitution and judgment was entered on February 28, 1973. Plaintiffs appealed from this judgment to the Appellate Division, Second Department, which affirmed the judgment

of the Supreme Court, without opinion. Plaintiffs appealed this judgment to the Court of Appeals, which affirmed the Appellate Division by a vote of 5 to 2, and found that restricting land use to the elderly was a non-discriminatory exercise of the Town's police power to regulate and restrict land use. It made no specific finding with respect to the issue limiting ownership and operation to a non-profit, New York corporation. From this judgment, entered on June 9, 1975, in the Supreme Court, County of Suffolk, the Plaintiffs-Appellants above-named, appeal to this Court.

The Question is Substantial

The very essence of the constitutional and statutory principle of zoning is that a zoning authority is charged with the regulation of land use and not with regulation of the person who owns, occupies, operates or uses it. 1. Rathkopf, *Law of Zoning and Planning*, pp. 1-27; *Matter of Dexter* v. *Town Board of the Town of Gates*, 36 N.Y. 2d 102 (1975); *Matter of Weinrib* v. *Weisler*, 27 N.Y. 2d 592, *affg.* 33 A.D. 2d 923. The decision of the New York Court of Appeals in this case, sustaining the creation by the Town of Huntington of a new classification of land regulation, predicated on *who* may own and use the land, is an unprecedented and radical departure from the fundamental principle of zoning which limits the zoning power to regulation of the use of land and does not extend to regulation of the owner or user.

In failing to adhere to the fundamental rule that zoning deals basically with land use and not with the person who owns or uses the land, the Court of Appeals committed an error of magnanimous proportions. This decision would chart an entirely new principle of zoning, dealing basically with the owner, operator or user of the land. This departure from the universally established

principle of the law of zoning not only deprived the Appellants of equal protection of the law, under both the Federal and State Constitutions (Article I, S. 11) but will have serious and widespread implications throughout the Country. Moreover, it is in direct conflict with two recent decisions in the State of New Jersey, which held a substantially similar ordinance to be unreasonable, arbitrary and discriminatory. *Taxpayers Association of Weymouth Township, Inc.* v. *Weymouth Township*, 125 N.J. Super 376 (App. Div.); *Shepard* v. *Woodland Township Committee and Planning Board*, 128 N.J. Super 379 (Super. Ct., Ch. Civ.).

Whether Municipal Zoning Ordinances May Validly Regulate or Restrict the Persons Who Own, Occupy, Operate or Use the Land.

Traditionally and constitutionally, the zoning power has been held to operate solely in relation to the use of the land without regard to the ownership of the property involved or who may be the operator of the use. 1. Rathkopf, *Law of Zoning and Planning*, Sec. 4. Zoning regulations, while designed to promote the public welfare, must necessarily operate without discrimination between landowners, must otherwise operate within constitutional limitations (such as confinement to the powers granted in the enabling act), and within the fundamental principle of zoning. *Matter of Barker* v. *Switzer*, 209 App. Div. 151, 153 (1924); *De Sena* v. *Gulde*, 24 A.D. 2d 165 (1965). The Appellants contend, and have contended, in the Courts below, that the Town's Retirement Community District failed to meet any of these tests. The ordinance specifies the persons who may own, occupy and use the land; it discriminates against all persons other than those specified persons; and it exceeds the legislative delegation of authority to zone embodied in Town Law, S. 261. Town Law, S. 261 empowers a Town Board to regulate and restrict the use of land

"(f)or the purpose of promoting the health, safety, morals, or the general welfare of the community" by " . . . regulat(ing) and restrict(ing) the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and *use of buildings, structures and land* for trade, industry, residence or other purposes . . . " (emphasis added). There is no other Law, constitutional otherwise, under New York law, empowering Towns to regulate or restrict the use of land. *Golden* v. *Planning Board of the Town of Ramapo*, 30 N.Y. 2d 359, 370; *De Sena* v. *Gulde, supra; Shepard* v. *Village of Skaneateles*, 300 N.Y. 115, 118.

The Court of Appeals, on the other hand, concluded that the Town's zoning ordinance had a national basis, was within the Town's police powers to "regulate land *use*" and met a proper government objective. The usual standard is that if a law be reasonable, not arbitrary, and bears a rational relationship to a proper government objective, it will be sustained. *Boraas* v. *Village of Belle Terre*, 416 U.S. 1 (1974). This is true, provided that that law functions in connection with a fundamental principle to which it must necessarily relate in order to be operative. In the *Belle Terre* case the ordinance (a traditional residence district restricting residences to one family dwellings) met the test of the fundamental principle of zoning—regulation of the use of the land.

The error of the Court of Appeals in this case, and of the lower courts, was in applying the rule enunciated in *Boraas* v. *Village of Belle Terre* to the wrong principle, indeed, to a non-existent principle. There is no principle in the field of zoning, charging, authorizing or permitting zoning officials to regulate or restrict the persons who may own, occupy, operate or use land. In fact, such a proposition is contrary to the most basic concept of the zoning

power—regulation of land use without regard to the owner or user. *Matter of Dexter* v. *Town Board of the Town of Gates*, 36 N.Y. 2d 592, 593, *affg.* 33 A.D. 2d 923; 1. Rathkopf, *Law of Zoning and Planning*, pp. 1-27; *Vlahos Realty Co.* v. *Little Boar's Head Dist.*, 101 N.A. 460, 463; *Mayor* v. *Poe*, 224 Md. 428, 433.

As the Supreme Court observed in *Boraas* v. *Village of Belle Terre, supra*, p. 6, "If the ordinance segregated one area only for one race, it would immediately be suspect under the reasoning of *Buchanan* v. *Warley*, 245 U.S. 60. . . ." Appellants contend that an ordinance is equally suspect if it segregates an area for the young, or for the poor, or for the rich, or for minority groups, or for the handicapped, or for domestic corporations, or for non-profit organizations, or for blacks, or for whites, or any other class of persons, including the elderly. As Justice Marshall succinctly stated in his dissent in the same case (pp. 14-15), "Zoning officials properly concern themselves with the uses of land—with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are . . .". *Central Management Co.* v. *Town of Oyster Bay*, 47 Misc. 2d 385-387, *aff'd* 24 A.D. 2d 881; *Hinman* v. *Planning and Zoning Commission*, 25 Conn. Sup. 125.

Financial aid and housing for the economically deprived, for minority groups, for the handicapped, for the elderly, even for young married couples, are worthy and legitimate government objectives in themselves relating to public health, safety, morals or general welfare. These objectives, however worthy they may be, can not be used as a guise to initiate whole new classifications for land use, predicated on the regulation or restriction of the persons owning or using the land, for to do so would be to permit municipalities to arbitrarily select any of those categories for special and more favorable consideration

and treatment than that given another class of persons. *Taxpayers Association of Weymouth Township, Inc.* v. *Weymouth Township*, 125 N.J. Super. 376 (App. Div.); *Shepard* v. *Woodland Township Committee and Planning Board*, 128 N.J. Super. 379 (Sup. Ct. Ch. Div.); *Molino* v. *Mayor and Council of Borough*, 116 N.J. Super 195.

CONCLUSION

The power of a municipality, in the exercise of its zoning powers, does not include the right to regulate or restrict the persons who may own, occupy, operate or use land. The decision of the Court of Appeals in this case, sustaining such a right, limiting ownership and operation to non-profit corporations organized only in New York, and occupancy to an undefined class of aged persons, substantially subverts the well established, universal and fundamental principle of zoning, restricting such powers to land use. The consequences of this decision will be widespread and if followed in New York and other jurisdictions will utterly destroy the foundation upon which the zoning powers have been so carefully constructed. Moreover, in view of the opposite result reached in the New Jersey cases cited, the decision requires a consideration of the effect of such new standards in the exercise of municipal zoning powers and their effect on the equal protection of the law under the Constitution.

The Appellants respectfully request that probable jurisdiction be noted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Court of Appeals of the State of New York

STATE OF NEW YORK

COURT OF APPEALS

2 No. 46

ROBERT MALDINI, et al.,

Appellants,

—VS.—

JEROME A. AMRBO, Supervisor, et al., as Members of the Town Board, Town of Huntington, et al.,

Respondents.

FUCHSBERG, *J.*:

The issues posed are (1) whether the Town Board of the Town of Huntington exceeded its powers by amending its zoning ordinance to create a residence district providing, among other uses, for a "Retirement Community District" and (2) whether a subsequent resolution of the Town Board granting an application of defendant Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc. (Health Care Agencies), a non-profit New York corporation, to rezone its twenty-acre parcel of land from a "Residence B district" (single family dwellings on minimum one acre plots) to a "Retirement Community District" for the purpose of building residences designed for older people was valid.

This action for declaratory judgment and injunctive relief, is brought by individual home owners living in the

area of the proposed retirement community. Following trial, the Supreme Court upheld both the amendment and the resolution. The Appellate Division unanimously affirmed. We hold that the Town Board's zoning power was validly exercised in its adoption of the amendment in question and that Health Care Agencies' subsequent application thereunder was properly granted.

The amendment, now Chapter 62, section 4.9.01 of the Building Zone Ordinance of the Town of Huntington, was adopted following a public hearing. It reads as follows:

> "In the R-RM Residence District a building or premises shall be used only for the following purposes:
>
> "(1) Any use permitted in the R-80 Residence District [single family dwellings on minimum two acre plots and other uses including farms, churches, schools and libraries].
>
> "(2) Multiple residences designed to provide living and dining accommodations, including social health care, or other supportive services and facilities for aged persons tobe owned and operated by a non-profit corporation organized for such purposes under the laws of the State of New York.
>
> "(3) Any accessory use or structure permitted in the R-80 Residence District . . ."

After the amendment was adopted, Health Care Agencies applied for a reclassification as "Retirement Community District" for its twenty acre parcel, presenting a plan which provided the facilities enumerated in the ordinance's amendment. The application was granted following a public hearing. None of the plaintiffs appeared or in any other way raised any objection at that

hearing or at the earlier one that had preceded passage of the amendment itself. Plaintiffs now claim that the Town Board exceeded the zoning powers delegated it by the legislature and impermissibly applied a classification based upon age.

The relevant enabling legislation pursuant to which the Town Board has the power to zone is Town Law § 261. By that statute the state has empowered the town to regulate and restrict the use of land "[f]or the purpose of promoting the health, morals or general welfare of the community". In our view, this grant provides a sufficient basis for the Town of Huntington's zoning law amendment to provide for multiple residences for elderly people.

The police power which provides the justification for zoning is not narrowly confined. (*Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 1541.) As Judge Keating put it for this court, "[u]nderlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philospher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems." (*Udell* v. *Haas*, 21 N.Y. 2d 463, 469.)

In view of the breadth of the grant of power and the presumption favoring constitutionality of zoning ordinances (*Dauerheim, Inc.* v. *Town Board of Town of Hempstead*, 33 N.Y. 2d 468, 473-474; *Mary Chess, Inc.* v. *City of Glen Cove*, 18 N.Y. 2d 205, 209), we have concluded that the Town Board's amendment to Huntington's zoning ordinance has a rational basis. Its purpose—meeting the Town's need for adequate housing for the

aged—was within the Town's police powers to regulate land use for the promotion of the community's health and general welfare. Not only was this an important goal of the Town's Comprehensive Plan,[1] but a matter of general public concern not only to the locality but to the state and nation as well.[2]

Though the Town has no burden to establish a need for the amendment (*Thomas* v. *Town of Bedford*, 11 N.Y. 2d 428, 434), there was unrebutted testimony at trial that studies showed the Town's elderly population was increasing at a substantially greater rate than had been anticipated and that there was considerable and justifiable community concern over the lack of available specialized housing for the aged.[3]

---

[1] The Comprehensive Town Plan of the Town of Huntington, at p. 5, states the importance of "Population Composition" in town planning as follows: "[f]or planning purposes, the composition of the population is as important as sheer numbers . . . Age composition is significant as an aid in programming not only schools, but recreational requirements and the needs of the elderly."

[2] See, N.Y. Const., art. XVIII, § 1 ("nursing home accommodations for persons of low income"); Private Housing Finance Law, art. II, § 11 (declaring ". . . seriously inadequate supply of safe and sanitary . . . aged care accommodations for aged persons of low income . . . constitute[s] an emergency and grave menace to the health, safety, morals, welfare and comfort of citizens of this state . . ."); National Housing Act, U.S. Code, tit. 12, § 1701 ("Congress finds that there is a large and growing need for suitable housing for older people both in urban and rural areas. Our older citizens face special problems in meeting their . . . need for housing planned and designed to include features necessary to the safety and convenience of the occupants in a suitable neighborhood environment.").

[3] It has been observed that older people are now playing an increasing active role in our society and their common residential pattern is changing from dependence on their children or upon institutions to one in which individuals and couples seek to live in their own homes, many in retirement communities. See, Neugarten, "The Rise of the Young and Old", New York Times, January 18, 1975, p. 29.

It is also to be noted that the Town's good faith effort to meet the special needs of its elderly, who otherwise would be likely to be excluded from enjoyment of adequate dwellings within the community, is inclusionary. The inclusionary, as distinguished from exclusionary, nature of such land use is made clear by the Town Board's conclusion (1) that there is a present shortage for housing for people when they get older, (2) that without the creation of the Retirement District that need will go unredressed, and (3) that ameliorating the need in this way will impose no particular hardship on other of persons who suffer from significant lack of housing. Certainly, when a community is impelled, consistent with such criteria, to move to correct social and historical patterns of housing deprivation, it is acting well within its delegated "general welfare" power.

Plaintiffs do not claim they would suffer exclusion or disadvantage in their own housing. At trial, they merely offered one witness, a real estate appraiser, who testified that Health Care Agencies' proposed retirement community would increase traffic in the neighborhood and reduce the value of surrounding residential properties, which he valued at $75,000 to $100,000. But it is well-settled that a possible depreciation in value to particular property owners will not shield an existing zoning classification from adaptation to changing community needs (see, e.g., *Shepard* v. *Skaneateles*, 300 N.Y. 115, 118, 120). In brief, plaintiffs fell far short of meeting their burden of showing that the amendment was arbitrary rather than rational. (See, *Seattle Title Trust Co.* v. *Roberage*, 278 U.S. 116, 122.)

Nor do plaintiffs suggest that Huntington was in error in assessing the need for suitable housing for its

elderly population, or that the plan submitted by Health Care Agencies in any way fell short of the standards of the ordinance, requiring as they do "living and dining accommodations including social health care, or other supportive services and facilities for aged persons". While the amendment under attack makes express provision, among other uses, for suitable housing for the elderly, as with special zoning for schools it does no more in this case than implement the entirely supportable belief by the Town that the aged require specially designed accommodations.

Central Management Co. v. *Town of Oyster Bay*, 47 Misc. 2d 385, *affd.* 24 A.D. 2d 881, on which plaintiffs place such heavy reliance, is, in our opinion, inapt. There, the town board had denied a request for a special exception permit to build garden-type apartments containing 75 percent units for the elderly and 25 percent for others. Though this type of apartment development was a permissible use under the zoning ordinance, the application was denied because the board concluded that the comfort of the proposed elderly residents would be disturbed by noise, problems of inadequate private and public transportation, and the distance of the proposed site from medical and banking facilities. In reversing that denial, the Supreme Court stressed that the board had acted in an administrative rather than a legislative capacity and found it had improperly considered the age of potential occupants of the proposed premises in determining whether or not to grant a special exception permit. Significantly, the court also found the board's findings that the site was "undesirable" for the elderly contrary to the evidence. By contrast, the instant case involves an ordinance enacted by the Huntington Town Board in its legislative capacity and providing standards for its application in a

particular case, as well as a subsequent determination pursuant to that ordinance which is supported by substantial evidence.

It is one thing for a local zoning board to deny an application based solely upon the age of the intended residents; it is quite another for it to establish a zoning district allowing, among other things, residences designed for, but not necessarily limited to, aged persons. "Age" considerations are appropriately made if rationally related to the achievement of a proper governmental objective. Here, as already indicated, meeting the community shortage of suitable housing accommodations for its population, including an important segment of that population with special needs, is such an objective.

In the particular case before us, there is no indication whatever that the intent or effect of the ordinance is to segregate the community according to age or discriminate against younger people (cf. *Molino* v. *Mayor and Council of Borough of Glassboro*, 116 N.J. Super. 195; *Taxpayers Assoc.* v. *Weymouth Township*, 125 N.J. Super. 376), or to benefit a particular building developer in the absence of community need for specialized housing for the elderly (cf. *Hinman* v. *Planning and Zoning Commission*, 25 Conn. Sup. 125). Neither does the ordinance contain an arbitrary specific age limitation for residency (cf. *Shepherd* v. *Woodland Township Committee and Planning Board*, 128 N.J. Super. 379). And the Town's unimpeachable good faith has not given rise even to a suspicion that it was seeking to reap tax base benefits through multidwellings without the drain on municipal services created by families and children. (cf. *Golden* v. *Planning Board of Ramapo, supra*, 30 N.Y. 2d at 378).

That the "users" of the retirement community district have been considered in creating the zoning classification does not necessarily render the amendment suspect, nor does it clash with traditional "use" concepts of zoning. Including the needs of potential "users" cannot be dissociated from sensible community planning based upon the "use" to which property is to be put. The line between legitimate and illegitimate exercise of the zoning power cannot be drawn by resort to formula, but as in other areas of the law, will vary with surrounding circumstances and conditions (*Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387). Therefore it cannot be said that the Board acted unreasonably in this case in making special provision for housing designed for the elderly, one of the major groupings within our population.[4]

"Senior citizenship" may be more appropriately regarded as a stage in life within the normal expectancy of most people than as an unalterable or obstinate classification like race (cf. *Buchanan* v. *Warley*, 245 U.S. 60; *Dailey* v. *Lawton*, 425 F.2d 1037; *Kennedy Park Homes Asso.* v. *Lackawanna*, 436 F.2d 108, *cert. den.*, 401 U.S. 1010), religion or economic status. Therefore, providing for land use suitable for the elderly may, as here, be viewed as a nondiscriminatory exercise of the power to

[4] The New York State Executive Department, Office of the Aging, Reports that as of 1970, 2,822,914 people in New York State were 60 or older; 121,533 of them resided in Suffolk County, in which Huntington is located; and 18,149 of them lived in Huntington. Half of New York's elderly lived in rented units. They occupy 1 out of 5 dwelling units in the state. (From the Department's "Facts & Ideas about Older Persons in New York State", Report No. 1 and Report No. 2 [1974].) According to the report, "[t]he growth of the older population has been phenomenal. Since the turn of the century there has been a five-and-one-half-fold increase". (Report No. 1, p. 9.)

provide for the general welfare of all people, especially since, even if the validity of that zoning classification were "fairly debatable, [the Town Board's] legislative judgment must be allowed to control." (*Euclid* v. *Ambler Realty Co.*, *supra*, at 368).

Accordingly, the order of the Appellate Division should be affirmed.

JASEN, *J.* (dissenting):

The question before us is not whether adequate housing should be provided for our aged citizens, but, rather, whether a town board may restrict the use of land solely for the benefit of the aged. While a fully agree with the majority that providing adequate housing for the aged is a matter of grave public concern, I believe that the town board, in attempting to alleviate this problem, exceeded its zoning powers by creating a land use classification based solely upon age.

It has long been the rule that a town's zoning power, if it is to be exercised lawfully, "must be founded upon a legislative delegation to so proceed, and in the absence of such a grant will be held *ultra vires* and void." (*Golden* v. *Planning Board of the Town of Ramapo*, 30 N.Y. 2d 359, 370.) Section 261 of the Town Law, the statutory grant of power to towns to enact and enforce zoning regulations, does, as the majority correctly notes, empower a town board to regulate and restrict the use of land "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community." However, a town board's powers under this section are not infinite; rather, a town board is empowered by this section only

to "regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and *use* of buildings, structures and land for trade, industry, residence or other purposes * * * * *" (Emphasis added.) The Town Law empowers a town board to regulate the *use*, not to specify the *users*. (Cf., *Matter of Dexter* v. *Town Board of the Town of Gates*, 36 N.Y. 2d 102 [decided February 18, 1975].) Nothing in the statute authorizes adoption of a zoning ordinance which restricts the age of those who may reside in a structure (cf., *Taxpayers Association of Weymouth Township, Inc.* v. *Weymouth Township*, 125 N.J. Super. 376 [App. Div.]) or which limits the use of a district to a particular class of persons (cf., *Hinman* v. *Planning and Zoning Commission*, 26 Conn. Sup. 125 [Ct. of Common Pleas]).[1] "Zoning officials properly concern themselves with the *uses* of land—with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider *who* those persons are * * * whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried." (*Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 14-15 [Marshall, J., dissenting] [emphasis added].) To this list I would add "young or old".

[1] The majority correctly notes that other uses are permitted in a R-RM Residence District and that in a strict sense, therefore, the uses in such a zone are not limited solely to a Retirement Community District. However, an examination of the other permissible uses (single-family houses on two-acre minimum plots, and such other low-density uses as farms, churches, schoosl, libraries, and certain municipal uses) reveals that the proposed retirement community, a high-density, multiple dwelling use, is clearly the highest and best use and would be significantly more profitable than the other permitted low-density uses. The practical effect, and apparently the intended effect, is to limit usage in this district to such a retirement community.

Moreover, not only is "age, in and of itself * * * just as irrelevant a consideration insofar as zoning is concerned as is race, color, creed or physical condition" (*Matter of Central Management Co.* v. *Town Board of the Town of Oyster Bay*, 47 Misc. 2d 385, 387, affd. 24 A.D. 2d 881), but it clearly favors a class without any apparent justification in violation of the Equal Protection Clause of the Fourteenth Amendment. (Cf., *Taxpayers Association of Weymouth Township, Inc.* v. *Weymouth Township*, 125 N.J. Super. 376, *supra; Shepherd* v. *Woodland Township Committee and Planning Board*, 128 N.J. Super. 379 [Super Ct., Ch. Div.].) Not only is the record devoid of any need for such a limiting classification,[2] but it is evident that adequate housing for the aged in the Town of Huntington can clearly be provided within the existing town zoning framework by constructing the necessary facilities for retired persons in an area already zoned for multiple dwellings, without creating an unauthorized land use classificattion based solely upon age.

Accordingly, I would reverse.

* * * * *

Order affirmed, with costs. Opinion by Fuchsberg, J. All concur except Jasen, J., who disgsents and votes to reverse in an opinion in which Wachtler, concurs.

Decided May 8, 1975

[2] It should be further noted that the ordinance here does not define "aged persons". The term "aged persons", therefore, may be so vague as to make the ordinance incapable of rational application.

APPENDIX B

Judgment Appealed From

SUPREME COURT

COUNTY OF SUFFOLK

Index No. 175860/69

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, BERNADETTE DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs,

—against—

JEROME A. AMBRO, supervisor, RICHARD KINSELLA, THOMAS CASEY, LEONARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC.,

Defendants.

The above Plaintiffs having appealed to the Court of Appeals of the State of New York from the Judgment of the Appellate Division, Second Department, entered in the Office of the Clerk of the County of Suffolk on the 19th day of December, 1973, which Judgment unanimously affirmed the Judgment of the Supreme Court of the State of New York, County of Suffolk, entered on the 28th day of February, 1973, in the Office of the Clerk of the County of Suffolk and the said appeal having come on to be heard before the said Court of Appeals and said Court having duly made an order affirming the Judgment of the Appellate Division, a copy of which, together with

Appendix B
Judgment Appealed From

the Record on Appeal, was remitted and filed in the Office of the Clerk of the County of Suffolk on the .... day of ....., 1975, and the costs and disbursements of the Defendant having been duly taxed in the sum of $547.97.

Now, on motion of Toaz, Buck, Myers, Brower, Bernst & Meservey, attorneys for the Defendant, it is

ADJUDGED that the Judgment entered herein on the 19th day of December, 1973, be and the same is hereby in all respects affirmed; and it is further

ADJUDGED that the Defendant-Respondent, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc. of 270 Boston Post Road, Rye, New York, recover of the Plaintiffs-Appellants, Robert Maldini and Rose Maldini of 2 Carol Court, Huntington, New York, Neal Maresca and Julia Maresca of 5 Sandra Drive, Huntington, New York, Harold Merck and Dorothy Merck of R.D. 6, Sandra Drive, Huntington, New York, Paul Di Matteo and Bernadette Di Matteo of 6 Carol Court, Huntington, New York, Fred Aprea and Blanche R. Aprea of R.D. 6, Vanderbilt Parkway, Huntington, New York, Manuel Moreno and Laura Moreno of Sandra Drive, Huntington, New York, John Simpson and Nina Simpson of 23 Sandra Drive, Huntington, New York, its costs as taxed, amounting to $547.47 and that the said Defendant-Respondent have execution therefor.

Judgment signed and entered this 9th day of June, 1975, at 3:35 P.M.

LESTER M. ALBERTSON,
Clerk.

FILED—Jun. 9, 1975
LESTER M. ALBERTSON
Clerk of Suffolk County

APPENDIX C

Judgment of the Supreme Court, Appellate Division, Second Department, State of New York, Which Was Affirmed by the Court of Appeals Judgment

SUPREME COURT

COUNTY OF SUFFOLK

Index #175860/69

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, BERNADETTE DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs,

—against—

JEROME A. AMBRO, Supervisor, RICHARD KINSELLA, THOMAS CASEY, LEONARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC.,

Defendants.

The Plaintiffs, Robert Maldini, Rose Maldini, Neal Maresca, Julia Maresca, Harold Merck, Dorothy Merck, Paul Di Matteo, Bernadette Di Matteo, Fred Aprea, Blanche R. Aprea, Manuel Moreno, Laura Moreno, John Simpson and Nina Simpson, having appealed from a judgment of the Supreme Court, Suffolk County, entered February 28, 1973, which judgment dismissed the complaint in all respects; adjudged that the amendment to the zoning ordinance which created a new district desig-

Appendix C
Judgment of the Supreme Court, Appellate Division, Second Department, State of New York, Which Was Affirmed by the Court of Appeals Judgment

nated as a "Retirement Community District" was constitutional, legal and valid and in full accord with the Constitution of the United States of America and of the State of New York; adjudged that the zoning of the property in question from a "Residence B District" to a "Retirement Community District" was within the authority specifically conferred upon the Town Board by § 261 of the Town Law in that the same was rezoned to promote the health, safety, morals and general welfare of the community and was not an arbitrary or unreasonable exercise of legislative power and further adjudged that the resolution rezoning the property in question from a "Residence B District" to a "Retirement Community District" was not in violation of the Comprehensive Plan of the Town of Huntington; and the appeal having been heard at a term of the Appellate Division of the Supreme Court, Second Judicial Department, held in the County of Kings, in the City of New York, on the 25th day of October, 1973, and an order of said Appellate Division having been made unanimously affirming the judgment of the Supreme Court, County of Suffolk, with costs to the Respondent, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., against the Plaintiffs-Appellants, and a certified copy of said order having been duly filed, together with the record, in the Office of the Clerk of the County of Suffolk,

NOW, on motion of Toaz, Buck, Myers, Brower, Bernst & Meservey, attorneys for the Defendant-Respondent, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., it is

Appendix C
Judgment of the Supreme Court, Appellate Division, Second Department, State of New York, Which Was Affirmed by the Court of Appeals Judgment

ORDERED, that the judgment entered the 28th day of February, 1973, in the Office of the Clerk of the County of Suffolk, be and the same is unanimously affirmed, and it is further

ORDERED, that the Defendant-Respondent, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., of 270 Boston Post Road, Rye, New York, recover of the Plaintiffs-Appellants, Robert Maldini and Rose Maldini of 2 Carol Court, Huntington, New York, Neal Maresca and Julia Maresca of 5 Sandra Drive, Huntington, New York, Harold Merck and Dorothy Merck of R.D. 6, Sandra Drive, Huntington, New York, Paul Di Matteo and Bernadette Di Matteo of 6 Carol Court, Huntington, New York, Fred Aprea and Blanche R. Aprea of R.D. 6, Vanderbilt Parkway, Huntington, New York, Manuel Moreno and Laura Moreno of Sandra Drive, Huntington, New York, John Simpson and Nina Simpson of 23 Sandra Drive, Huntington, New York, its costs as taxed, amount to $477.72 and that the said Defendant-Respondent have execution therefor.

Judgment signed and entered this 19th day of December, 1973, at 10:30 A.M.

Filed Dec. 19, 1973

LESTER M. ALBERTSON
Clerk

APPENDIX D

Judgment of the Supreme Court, County of Suffolk, State of New York, Which Was Affirmed Without Opinion by the Judgment of the Appellate Division, Second Department

Maldini, ap. v. Ambro, res.—Judgment of the Supreme Court, Suffolk County, entered Feb. 28, 1973, affirmed, with costs to respondent Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc. No opinion.

N.Y. Law Journal
11/21/73

SUPREME COURT

Suffolk County

JUDGMENT AFTER TRIAL

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, BERNADETTE DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs,

—against—

JEROME A. AMBRO, Supervisor, RICHARD KINSELLA, THOMAS CASEY, LEONARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC.,

Defendants.

Appendix D
Judgment of the Supreme Court, County of Suffolk, State of New York, Which Was Affirmed Without Opinion by the Judgment of the Appellate Division, Second Department

The issues in the above entitled action having been brought on regularly for trial before the Honorable William R. Geiler at a Special Term Part III thereof held in and for the County of Suffolk at the Supreme Courthouse thereof, at Hauppauge, New York, on the 20th day of November, 1972 and the plaintiffs having appeared by Alfred J. Skidmore, Esq. and the defendant, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., having appeared by Toaz, Buck, Myers, Brower, Bernst & Meservey Esqs., by Louis C. Bernst and Robert B. Armstrong, Esqs. of Counsel, and the issues having been duly tried, and the Court after due deliberation having rendered a decision in favor of the defendant, Health Care Agencies of the New York Annual Conference of the Methdist Church, Inc.

Now, on motion of Toaz, Buck, Myers, Brower, Bernst and Meservey Esqs., attorneys for the defendant Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., it is.

ADJUDGED that the amendment to the Zoning Ordinance enacted by the defendant Town Board on the 30th day of August, 1966, which amendment created a new district designated as a "Retirement Community District" was constitutional, legal and valid and in full accord with the Constitutions of the United States of America and of the State of New York, and it is further,

ADJUDGED that the rezoning of the property in question from a "Residence B District" (now known as R-40

Appendix D
Judgment of the Supreme Court, County of Suffolk, State of New York, Which Was Affirmed Without Opinion by the Judgment of the Appellate Division, Second Department

Residence District) to a "Retirement Community District" (now known as R-RM Retirement Community District) which rezoning occurred on December 20, 1966, was within the authority specifically conferred upon the Town Board by Section 261 of the Town Law in that same was rezoned for the purpose of promoting the health, safety, morals and the general welfare of the community and was not an arbitrary or unreasonable exercise of legislative power, and it is further,

ADJUDGED that the resolution rezoning the property in question from a "Residence B District" (now known as R-40 Residence District) to a "Retirement Community District" (now known as R-RM Retirement Community District) was not in violation of the Comprehensive Plan of the Town of Huntington, and it is further

ADJUDGED that the complaint herein be and the same is, in all respects, dismissed.

ENTER,

WILLIAM R. GEILER
J.S.C.

Granted
Feb. 27, 1973
Lester M. Albertson
Clerk

Filed
Feb. 28, 1973
Lester M. Albertson
Clerk of Suffolk County

APPENDIX E

Opinion of the Supreme Court, County of Suffolk, State of New York

SUPREME COURT

Suffolk County

This is an action to declare an amendment to the Town of Huntington Zoning Ordinance entitled "Retirement Community District" unconstitutional, and to declare invalid a resolution of the Huntington Town Board granting an application by defendant Health Care Agencies for a change of zoning classification on certain real property from Residence "B" District to "Retirement Community District".

The defendant Health Care Agencies is the owner of 20 acres of land situated on the east side of Deer Park Avenue, approximately 350 feet south of Vanderbilt Parkway, in the Town of Huntington. The premises herein, prior to December 1966, was zoned Residence "B". This zoning classification provided for the erection of one family dwellings on a minimum plot size of one acre.

The Huntington Town Board, on August 30, 1966, amended the Zoning Ordinance by creating a new zoning classification designated "Retirement Community District". The defendant Health Care Agencies applied to the Town Board for a change of zoning classification for the subject 20 acres from Residence "B" to "Retirement Community District" for the purpose of building living quarters for the elderly. The zoning change was granted in December 1966.

Plaintiffs, individual homeowners, residing within the general area of the proposed retirement community, request this Court to declare the subject amendment to the

Appendix E
Opinion of the Supreme Court, County of Suffolk, State of New York

Zoning Ordinance and the change of zoning classification on the property owned by the Health Care Agencies illegal and void on the following grounds:

1. The adoption of the resolution creating the Retirement Community District was an unlawful exercise of the zoning power under constitutional and Town Law limitations.
2. The adoption of the resolution changing the zone of defendant's parcel from Residence "B" District to "Retirement Community District", was in violation of the Town's Comprehensive Plan.

Is there any basis for the Town of Huntington establishing a "Retirement Community District"? Has the Town exceeded constitutional limitations in enacting such legislation?

Article XVIII of the New York State Constitution specifically empowers the Legislature to provide housing for the aged. The New York State Legislature, pursuant to this constitutional provision, enacted the Mitchell-Lama Law in 1955.

The public policy of this State is embodied in Section II of the Law in the following language:

> "It is hereby declared that there exists in municipalities in this State a seriously inadequate supply of safe and sanitary dwelling accommodations for families and persons of low income, including aged persons of low income; that such conditions are due, in large measure, to overcrowding and concentration of the population, improper planning, excessive land coverage, lack of proper light, air

Appendix E
Opinion of the Supreme Court, County of Suffolk, State of New York

and space, improper sanitary facilities and inadequate protection from fire hazards; that such conditions constitute an emergency and a grave menace to the health, safety, morals, welfare and comfort of citizens of this state, necessitating speedy relief which cannot readily be provided by the ordinary unaided operation of private enterprises and require that provision be made by which private free enterprise may be encouraged to invest in companies regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing housing facilities and other facilities incidental or appurtenant thereto for families or persons of low income; that it is necessary that provision be made for participation by the state, its municipalities and the New York State housing finance agency in the financing of such housing, for the acquisition by such companies of real property required for such purposes and for public assistance to such companies by the granting of tax exemptions; that the cooperation of the state, its subdivisions and the New York State housing finance agency is necessary to accomplish such purposes; that the provision of such adequate, safe and sanitary housing accommodations by such companies jointly or severally are public uses and purposes for which public money may be loaned and private property may be acquired by and for such companies and tax exemptions granted; that such conditions require the creation of the companies hereinafter prescribed for the purpose of attaining the ends herein recited; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

Appendix E
Opinion of the Supreme Court, County of Suffolk, State of New York

In fact, the need to provide adequate housing for the aged has not only been recognized by the State but also by the Federal Government as indicated by Section 1701 of the National Housing Act.

> "That Congress finds that there is a large and growing need for suitable housing for older people both in urban and rural areas. Our older citizens face special problems in meeting their housing needs because of the prevalence of modest and limited incomes among the elderly, their difficulty in obtaining liberal long-term home mortgage credit, and their need for housing planned and designed to include features necessary to the safety and convenience of the occupants in a suitable neighborhood environment. The Congress further finds that the present programs for housing the elderly under the Department of Housing and Urban Development have proven the value of Federal credit assistance in this field and at the same time demonstrated an urgent need for an expanded and more comprehensive effort to meet our responsibilities to our senior citizens."

Section 261 of the Town Law empowers a Town Board to regulate and restrict the use of land, among other things, "for the purpose of promoting the health, safety, morals, or the general welfare of the community".

The need for adequate housing for the aged in Huntington was amply demonstrated at public hearings and was not contested. The establishment of a zoning classification, designed to carry out the public policy of the nation and state and which will promote the general welfare of the community, cannot be considered an arbi-

Appendix E
Opinion of the Supreme Court, County of Suffolk, State of New York

trary or unreasonable exercise of legislative power. It is inconceivable to this Court that the Town Board does not have the power to enact legislation which will implement the public policy of this nation and state at the very level at which such implementation is vital in order to be effective.

Was the adoption of the resolution rezoning the property of defendant Health Care Agencies as a retirement community in violation of the Town of Huntington's Comprehensive Plan? Was the action of the Town Board arbitrary?

The plaintiffs produced only one witness, Walter J. Smith, a real estate appraiser, at the trial herein. An analysis of his testimony indicates the following: He testified that he had driven by the front of the subject property about a week before the trial. He viewed the property from a side road, but was unable to estimate how far he was from the subject property. He admitted that certain permitted uses would have a more detrimental effect on surrounding properties than the proposed "retirement village" for the elderly. He stated that the proposed retirement community would have a depreciating effect upon the surrounding properties. However, he could not calculate the depreciation except to compare it to an unrelated study in Nassau County pertaining to houses of worship and said the "percentage difference" ranged between 5 and 35 percent. This comparison can best be described as comparing apples with potatoes. There is no relation whatsoever.

Mr. Smith further testified that additional traffic was the single most factor in arriving at his conclusion that

Appendix E
Opinion of the Supreme Court, County of Suffolk, State of New York

the retirement community would have a depreciating effect upon the surrounding properties. However, he did not know what traffic would be involved in a retirement community. He also admitted that he did not know what the plaintiffs paid for their homes.

Smith's testimony is perhaps best characterized as being a brief for the proposition that the retirement community will have little or no detrimental effect upon the value of the surrounding property.

The plaintiffs failed to dispute the fact that none of them were present or objected to the retirement community at any of the public hearings. They also failed to dispute the fact that there is a need for housing for aged individuals in the Town of Huntington. The evidence in the record is uncontroverted that the Planning Board and the Planning Director carefully studied this matter on a minimum of fifteen occasions prior to recommending its approval. The findings of the Planning Board that there would not be any adverse effect on the character of the neighborhood was also uncontraverted.

Plaintiffs' idea of a comprehensive plan is that of a fixed, static, unchangeable instrument. It is contrary to the view generally held by planning experts as expressed by the Court in the case of *Walus* v. *Millington*, 266 N.Y.S. 2d 833, at page 839 in the following terms:

> "A comprehensive plan is not necessarily a written document. Jackson & Perkins Co. v. Martin, 16 A.D. 2d 1, 225 N.Y.S. 2d 112, 115, revd. on other grounds 12 N.Y. 2d 1082, 240 N.Y.S. 2d 29, 190 N.E. 2d 422. It is an underlying purpose to control land uses for the benefit of the whole com-

Appendix E
Opinion of the Supreme Court, County of Suffolk, State of New York

munity based upon consideration of the community's problems and applying the ordinance itself or a general policy to obtain a uniform result. Place v. Hack, 34 Misc. 2d 777, 230 N.Y.S. 2d 583; Thomas v. Town of Bedford, 29 Misc. 2d 861, 214 N.Y.S. 2d 145, aff'd 15 A.D. 2d 573, 222 N.Y.S. 2d 1021, mot. den. 11 N.Y. 2d 886, 227 N.Y.S. 2d 924, 182 N.E. 2d 412, aff'd 11 N.Y. 2d 428, 230 N.Y.S. 2d 684, 184 N.E. 2d 285, 98 A.L.R. 2d 219; Soule v. Town of Perington, Sup. 152 N.Y.S. 2d 734, app. dism. 2 A.D. 2d 834, 156 N.Y.S. 2d 986. It requires a consideration of the individual parcel's relationship to the community as a whole. Connell v. Town of Granby, 12 A.D. 2d 177, 209 N.Y.S. 2d 379. In short, the requirement is that a plan be implicit in the zoning regulations as a whole and that the amendments be consistent with such plan and not enacted on a piecemeal or haphazard basis. Anderson, N. Y. Zoning, Par. 5.02, p. 83. If the amendment is calculated to benefit the community as a whole as opposed to the private welfare of the individual owners, it passes muster and incidental benefit or detriment to the owners of the rezoned property or of the neighborhood property is of no direct consequence in determining the validity of the legislation."

The federal and state governments have recognized the need for housing for the elderly. The Town Board, after hearing evidence of such need in Huntington, followed the accepted view of comprehensive planning for the general welfare by providing a means to meet that need.

Appendix E
Opinion of the Supreme Court, County of Suffolk, State of New York

The plaintiffs may not wish to have this retirement community as their neighbors. However, that, in of itself, is no reason to strike this ordinance. The elderly are not to be shunned, put in a distant corner of the Town and be forgotten. They have a right to enjoy their remaining years in decent housing, in an area which will provide all the necessary amenities, including transportation, shopping and recreation. They have earned the right to live in dignity and a zoning ordinance which implements this noble idea, without harm to the general community, will not be set aside. Perhaps it would be well for the plaintiffs to remember that a society is judged by the treatment of its aged.

The plaintiffs have failed to meet their burden of proof that the ordinances here are unconstitutional and the action is dismissed without costs (Mary Chess, Inc. v. Glen Cove, 18 N.Y. 2d 205, 273 N.Y.S. 2d 46).

The foregoing constitutes the decision of the Court pursuant to Section 4213 of the C.P.L.R. Submit judgment.

WILLIAM R. GEILER
J.S.C.

APPENDIX F

Notice of Appeal to the Supreme Court of the United States

SUPREME COURT

COUNTY OF SUFFOLK

Index #175860/69

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, BERNADETTE DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs,

—against—

JEROME A. AMBRO, Supervisor, RICHARD KINSELLA, THOMAS CASEY, LEONARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC.,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Robert Maldini, Rose Maldini, Fred Aprea, Blanche R. Aprea, John Simpson and Nina Simpson, Appellants above named, hereby appeal to the Supreme Court of the United States from a final judgment entered in the Office of the Clerk of the County of Suffolk on the 9th day of June, 1975, upon an Order of the Court of Appeals of the State of New York, affirming a judgment of the Appellate Division,

Appendix F
Notice of Appeal to the Supreme Court of the United States

Second Department, State of New York, entered in the Office of the Clerk of the County of Suffolk on the 19th day of December, 1973, which judgment affirmed the judgment of the Supreme Court of the State of New York, County of Suffolk, entered in this action in the Office of the Clerk of the County of Suffolk, State of New York.

This appeal is taken pursuant to 28 USCA, S. 1257 (2).

Dated: August 27, 1975.

Yours, etc.,

ALFRED J. SKIDMORE
Attorney for Appellants
Office & P. O. Address
117 Newbridge Road
Hicksville, N. Y. 11802
WE 8-1500

To: TOAZ, BUCK, MYERS, BROWER, BERNST & MESERVY, ESQS.,
Attorneys for Defendant,
Health Care Agencies of the
N. Y. Annual Conference of
the Methodist Church, Inc.

CLERK OF THE SUPREME COURT
Suffolk County

APPENDIX G

Opinion of the Supreme Court, Suffolk County, State of New York, on Plaintiff's Motion for Summary Judgment

MEMORANDUM

SUPREME COURT

COUNTY OF SUFFOLK

SPECIAL TERM

Index #175860/69

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, BERNADETTE DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs,

—against—

JEROME A. AMBRO, Supervisor, RICHARD KINSELLA, THOMAS CASEY, LEONARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC.,

Defendants.

HILL, J.S.C.

Dated May 9, 1969

ALFRED J. SKIDMORE, ESQ.,
Attorney for Plaintiffs,
115 North Broadway,
Hicksville, New York. 11802

Appendix G
Opinion of the Supreme Court, Suffolk County, State of New York, on Plaintiff's Motion for Summary Judgment

ARTHUR GOLDSTEIN, ESQ.,
Town Attorney-Town of Huntington,
209 Main Street,
Huntington, New York.
Anthony R. Corso, Esq., of Counsel.
TOAZ, BUCK, MYERS, BROWER, BERNST & MESERVY, ESQS.,
Attorneys for Health Care Agencies, etc.
381 New York Avenue,
Huntington, New York.

This is an action for a judgment declaring invalid amendments to the Building and Zoning Ordinance of the Town of Huntington which established a "Retirement Community District" and rezoned to this classification a parcel in plaintiffs' neighborhood. All parties move for summary judgment. The undisputed facts appear to be as follows:

Plaintiffs all live in Dix Hills near the rezoned parcel at distances varying from approximately 60 feet to as much as 1500 feet. Most plaintiffs have lived in the area for a number of years, some for over ten years, and they paid from $25,000. to $70,000. for their homes, the median price being $39,000. The neighborhood in which plaintiffs live is part of a very large area shown on the Town zoning map (Town Exhibit C) to be zoned for single family residences on plots not smaller than one acre. The "Comprehensive Plan" of the Town (Town Exhibit B-1) designates substantially the same large area for "low density" residential use. There is also a "medium density" and "high density" residential classification. In December 1966 the Town granted the application of defendant

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Health Care Agencies to rezone a parcel of property of about 20 acres from one acre, single family residential (then known as Residence B, now as R-40) to "Retirement Community District", known as R-RM. The classification of "Retirement Community District" had been created only a short time before when the Town amended its zoning ordinance in August 1966 to permit multiple dwellings, up to 14 units per acre, for use of "aged persons" on property to be owned and operated only by non-profit corporations organized under the laws of the State of New York. The rezoning had the effect of creating a 20 acre island for multiple dwellings surrounded for a long distance in every direction by a low density residential zone.

According to the affidavit of Alexander Wilson submitted by the Defendant Health Care Agencies of the Methodist Church, the history of the rezoning is as follows. In February 1965 Health Care Agencies, after searching for many months for an appropriate site to establish housing for aged persons, contracted to buy 18 of the 20 acres in question from the YMCA of Greater New York. The contract was conditioned upon the purchaser's ability to obtain municipal permission to construct multiple family residential units and facilities for aged persons. In September 1965 Health Care Agencies applied to the Town Board to establish a zone for a "Retirement Community District" and the matter was referred to the Planning Board. The Planning Board subsequently advised Health Care Agencies that an additional 50 feet of area along the southerly line would be required and accordingly Health Care purchased an additional 1.76 acres in July 1966. This contract was unconditional. In August 1966 the Town Board after a public

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hearing adopted an amendment to the Building Code Ordinance to provide for a Retirement Community District (Section 4-9 R-RM of Huntington Building Zone Ordinance). In addition to permitting "Multiple Residences designed to provide living and dining accommodations, including social, health care or other supportive services and facilities for aged persons to be owned and operated by a non-profit organization organized for such purposes under the Laws of the State of New York" this Section also permits any use allowed in the R-80 Residence District. An R-80 district is at the top of the residential classification and permits single family dwellings on plots not smaller than two acres and also farms, churches, public and private schools, libraries and certain municipal uses.

In September 1966 the Town Board held a public hearing on the application to change the Health Care 20 acre parcel from Residence B to Retirement Community District. Plaintiffs in the present action did not appear at this hearing or raise any objections and by resolution dated December 20, 1966 the Town Board rezoned the 20 acres in question to Retirement Community District. On January 10, 1967 title was conveyed by the YMCA to defendant Health Care Agencies, the purchase price still being $144,500. According to the Wilson affidavit Health Care Agencies has expended an additional $70,000. and has received 380 preliminary applications.

Plaintiffs move for summary judgment on two grounds, a third having been abandoned. Plaintiffs claim first that the creation of a Retirement Community District which restricted ownership and control to non-profit corporations organized only in the State of New York and which

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restricted use and occupancy to aged persons was unconstitutional and beyond the statutory authority granted to towns pursuant to Town Law § 261, § 262 and § 263. The second ground for the motion is that the rezoning of the particular parcel was in fact spot zoning as it was established at the specific request of the defendant rather than pursuant to a comprehensive plan for the general welfare of the community.

Plaintiffs' first argument, that the creation of the retirement district was unconstitutional, raises questions concerning the meaning of equal protection and the powers of municipal authorities to consider age as a factor in connection with zoning. See *Central Management Co.* vs. *Town of Oyster Bay*, 47 Misc. 2d 385, *aff'd* 264 N.Y.S. 2d 1011 and *Hinman* v. *Planning and Zoning Commission*, 26 Conn. Sup. 125, 214 A 2d 131. The constitutionality of the creation of the retirement zone need not now be decided, however, in view of the resolution of the question of whether this zoning classification should have been imposed on the approximately twenty acres owned by defendant Health Care Agencies.

Plaintiffs' second argument is that the rezoning of the Health Care parcel was invalid because it did not conform to the Town's Comprehensive Plan. Defendants point out that this was the same charge leveled against the Village of Tarrytown in *Rodgers* v. *Village of Tarrytown*, 302 N.Y. 122. In that case the village, in 1947, created a zoning classification permitting garden apartments in residential zones, the boundaries to be delineated at such times as a property owner who met rather exacting standards should apply for such a rezoning. A year and a half later an applicant who met the standards succeeded in having her land rezoned and this rezoning as well as the original amendments permitting garden apartments in residential zones was attacked in an action for declaratory judgment. The Court of Appeals rejected the argument that this was "spot zoning" which it defined as "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners . . ." (302 N.Y. 123). The court concluded that spot zoning is the antithesis of planned zoning and stated (p. 124):

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> "If, therefore, an ordinance is enacted in accordance with a comprehensive zoning plan, it is not 'spot zoning', even though it (1) singles out and affects but one small plot (citing cases) or (2) creates in the center of a large zone small areas or districts devoted to a different use. . . . Thus, the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community. Having already noted our conclusion that the ordinances were enacted to promote a comprehensive zoning plan, it is perhaps unnecessary to add that the record negates any claim that they were designed solely for the advantage of defendant or any other particular owner."

"No New York case has defined the term 'comprehensive plan'." (*Udel* v. *Haas*, 21 N.Y. 2d 463 at 471). In *Rathkopf's Law of Zoning and Planning*, 3rd Edition, we are told (26-5), however, that the following factors

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lead courts to find that a zoning ordinance is not in accord with the comprehensive plan and hence is intended to favor the owner of the land.

1) surrounding land has the same characteristics but was left bound by more onerous restrictions.

2) the legislative body apparently considered only the specific use proposed and gave little consideration to all the uses permitted.

3) consideration was given only to the particular property and not to rezoning a larger area.

4) there has been no substantial change in the use of the property rezoned or of the general area.

Every one of these factors appears to be present in the case before us. The first and last factors are not denied, nor does it appear that they could be. There is no suggestion that the Town Board or the applicant considered using this land for the uses specified in R-80 and the evidence to the contrary is clear. No other property in the Town has been rezoned for a retirement community, nor does it appear that any other areas have been suggested or considered. The weight of this last factor seems somewhat diminished by the theory of the "floating zone" which the Court of Appeals promulgated—not without a strong dissent—*Rodgers* v. *Village of Tarrytown* (*supra*). It also appears, however, that the Court of Appeals has recently come to consider the possibility that " . . . zoning may easily degenerate into a talismanic word, like the "police power", to excuse all sorts of arbitrary infringements on the property rights of the landowner. To assure that this does not happen, our courts must require local zoning authorities to pay more than mock obeisance to

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the statutory mandate that zoning be "in accordance with a comprehensive plan". There must be some showing that the change does not conflict with the community's basic scheme for land use". (*Udell* v. *Haas*, 21 N.Y. 2d 463 at 470).

In the present case, as in the *Udell* case (*supra*), the basis scheme for land use may be garnered from the master plan and from the zoning map of the Town. The rezoning of the twenty acres for multiple dwellings with a density of 14 to the acre appears to conflict with the community's basic scheme for land use in the affected area. Moreover, the legislative history is significantly different from the history of the ordinance in *Rodgers* v. *Village of Tarrytown* (*supra*) on which case the defendant Town seems to rely heavily. Here the defendant Health Care Agencies did not appear a year and a half after the Town had decided it needed a Retirement District and present an application for a particular parcel which met the requirements of an already established "floating zone". On the contrary, it selected the parcel in question many months *before* petitioning the Town to establish such a zoning classification. About 18 months *after* Health Care signed the contract conditioning the purchase of the disputed parcel on its ability to use this particular parcel for a retirement community a classification was established which required that a retirement district comprise at least 15 acres and that the multiple residences be owned and operated by a non-profit corporation organized for such purposes under the laws of the State of New York. Health Care Agencies, unsurprisingly, met all these criteria and soon thereafter petitioned for a change of zone on its 20 acre parcel. Almost two years after Health Care selected the parcel the Town

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Board of Huntington confirmed its choice. On these facts the court which decided *Rodgers* v. *Village of Tarrytown* would presumably have answered differently the question of whether the zoning was for the benefit of individual owners rather than pursuant to a comprehensive plan. In the light of the admitted history of this rezoning and of the considerations set forth in *Rathkopf's Law of Zoning and Planning* (*supra*), previously discussed, the court is compelled to conclude that the zoning of the 20 acre parcel of Health Care Agencies was not part of the Town's comprehensive plan and was for the benefit of the owner of the parcel. The high purpose and unselfish motives of the owner merit the approval of the court but are irrelevant to the issues before us. Similarly, the firm declaration by defendant Town that it acted for the general welfare is, without more, insufficient considering the res gestae here.

> "There is no transcendental or magical effect from the use of the term 'general welfare' in justifying the adoption of an ordinance". *DeSena* v. *Gulde*, 24 A.D. 2d 165.

As in the *DeSena* case the Town Board here ignored its master plan, and apparently made no effort to preserve the value of buildings erected in reliance on the existing zoning by locating the retirement community in an area not yet improved or in a less restrictively zoned area.

Although the affidavit in support of the cross-motion for summary judgment by the Town alleges that there are factual issues which prevent summary judgment for the plaintiffs these are illusory. The Town's brief does not argue this point and there does not here appear to be any

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Opinion of the Supreme Court, Suffolk County, State of New York, on Plaintiff's Motion for Summary Judgment

need to take testimony. The contentions of defendant Health Care Agencies that it has a vested interest in an improper zoning and that the plaintiffs were guilty of laches are, under all the circumstances here present, likewise found to be unpersuasive. Accordingly plaintiffs' motion for summary judgment is granted. Enter judgment with costs.

L. BARRON HILL,
J. S. C.

APPENDIX H

Judgment of the Supreme Court, Suffolk County, on Plaintiff's Motion for Summary Judgment

SUPREME COURT

COUNTY OF SUFFOLK

Index #175860/69

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, BERNADETTE DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs,

—against—

JEROME A. AMBRO, Supervisor, RICHARD KINSELLA, THOMAS CASEY, LEONARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC.,

Defendants.

A motion having been duly made by the plaintiffs at a Special Term, Part I, of this Court held at the County Center, Riverhead, New York, on the 17th day of April 1969, for summary judgment in favor of the plaintiffs and against the defendants, pursuant to Rule 3212 of the Civil Practice Law and Rules, upon the grounds that there are no triable issues of fact and that there are no meritorious defenses in the answers of defendants to the causes of action asserted in the complaint, and said

Appendix H
Judgment of the Supreme Court, Suffolk County, on Plaintiff's Motion for Summary Judgment

motion having been granted and an order having been duly made by Mr. Justice L. Barron Hill and entered in the Office of the Clerk of this Court on the 11th day of June 1969, granting said motion and directing the entry of judgment as hereafter provided, and the costs of the said plaintiffs having been duly taxed by the Clerk at $.....

Now, on motion of Alfred J. Skidmore, Esq., 115 North Broadway, Hicksville, N. Y. 11802, attorney for the plaintiffs, it is

ADJUDGED AND DECREED, that the grant by defendant, Town of Huntington, of the application of defendant, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., to change the zone of premises owned by defendant, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., consisting of approximately 20 acres on the Easterly side of Deer Park Avenue about 450 feet South of Vanderbilt Parkway in the Town of Huntington, County of Nassau, State of New York, from R-40 Residence District (formerly Residence B District) to R-RM, Retirement Community District, is and the same is hereby declared to be void and contrary to the provisions of the comprehensive zoning plan of defendant, Town of Huntington; and it is further

ADJUDGED AND DECREED that the plaintiffs, Robert Maldini and Rose Maldini, 2 Carol Court, Huntington, New York; Neal Maresca and Julia Maresca, 5 Sandra Drive, Huntington, New York; Harold Merck and Dorothy Merck, R.D. 6, Sandra Drive, Huntington, New York;

Appendix H
Judgment of the Supreme Court, Suffolk County, on Plaintiff's Motion for Summary Judgment

Paul Di Matteo and Bernadette Di Matteo, 6 Carol Court, Huntington, New York; Fred Aprea and Blanche R. Aprea, R.D. 6, Vanderbilt Parkway, Huntington, New York; Manuel Moreno and Laura Moreno, Sandra Drive, Huntington, New York; and John Simpson and Nina Simpson, 23 Sandra Drive, Huntington, New York, recover of the defendants, Jerome A. Ambro, Richard Kinsella, Thomas Casey, Leonard Horn and Clayton Mugridge, constituting the Town Board, Town of Huntington, County of Suffolk, State of New York, all at Town Hall, Main Street, Huntington, New York, and Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., 270 Boston Post Road, Rye, New York, their costs and disbursements as taxed, amounting to $162.50 and that the plaintiffs have execution therefor.

Judgment this 20 day of June 1969. @ 11:37 A.M.

LESTER M. ALBERTSON
Clerk

Filed June 20, 1969
LESTER M. ALBERTSON
Clerk

APPENDIX I

Judgment of the Supreme Court, Suffolk County, Reversing the Judgment Entered on Motion for Summary Judgment

SUPREME COURT

COUNTY OF SUFFOLK

Index #175860/69

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, BERNADETTE DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs,

—against—

JEROME A. AMBRO, Supervisor, RICHARD KINSELLA, THOMAS CASEY, LEONARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC.,

Defendants.

The defendant, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., having appealed from (1) an order of the Supreme Court, Suffolk County, entered June 11, 1969 which granted plaintiffs' motion for summary judgment and denied defendants' separate cross motions for summary judgment and (2) a judgment of said court entered June 20, 1969 which, upon said order, *inter alia* declared a certain amendment of the

BEST COPY AVAILABLE

Appendix I
Judgment of the Supreme Court, Suffolk County, Reversing the Judgment Entered on Motion for Summary Judgment

Building Zone Ordinance of the Town of Huntington void, and the appeal having been heard at a term of the Appellate Division of the Supreme Court, Second Judicial Department, held in the County of Kings, in the City of New York on the 1st day of May, 1970 and an order of said Appellate Division having been made unanimously reversing said judgment on the law and modifying said order by striking therefrom the decretal provisions granting plaintiffs' motion and directing entry of judgment for plaintiffs and by substituting therefor a provision denying plaintiffs' said motion and unanimously affirming said order as so modified, with $10 costs and disbursements to the appellant against plaintiffs, and a certified copy of the said order having been duly filed together with the record, in the office of the Clerk of the County of Suffolk.

Now, on motion of Toaz, Buck, Myers, Brower, Bernst & Meservey, attorneys for the defendant, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., it is

ADJUDGED AND DECREED that the judgment entered in this action on the 20th day of June, 1969 in the office of the Clerk of the County of Suffolk, be and the same hereby is reversed on the law and it is further

ADJUDGED AND DECREED that the order entered in this action on the 11th day of June, 1969, be and the same hereby is modified by striking therefrom the decretal provisions granting plaintiffs' motion and directing entry of judgment for plaintiffs and by substituting therefor a provision denying plaintiffs' said motion and that, as so modified, said order be and the same hereby is affirmed, and it is further

Appendix I
Judgment of the Supreme Court, Suffolk County, Reversing the Judgment Entered on Motion for Summary Judgment

ADJUDGED AND DECREED that the defendant, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., of 270 Boston Post Road, Rye, New York, recover of the plaintiffs, Robert Maldini and Rose Maldini of 2 Carol Court, Huntington, New York, Neal Maresca and Julia Maresca of 5 Sandra Drive, Huntington, New York, Harold Merck and Dorothy Merck, of R.D. 6, Sandra Drive, Huntington, New York, Paul Di Matteo and Bernadette Di Matteo of 6 Carol Court, Huntington, New York, Fred Aprea and Blanche R. Aprea, of RD 6, Vanderbilt Parkway, Huntington, New York, Manuel Moreno and Laura Moreno of Sandra Drive, Huntington, New York, John Simpson and Nina Simpson of 23 Sandra Drive, Huntington, New York, its costs and disbursements as taxed, amounting to $1,128.90 and that the said defendant have execution therefor.

Judgment signed this 17 day of August, 1970 at 11:35 A.M.

LESTER M. ALBERTSON
Clerk

Supreme Court, U. S.
FILED
OCT 30 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75—378

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs-Appellants,

against

JEROME A. AMBRO, Supervisor, RICHARD KINSELLA, THOMAS CASEY, LEONARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc.,

Defendants-Respondents.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK ENTERED UPON AN ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF RESPONDENT HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC., TO DISMISS APPEAL

LOUIS C. BERNST
THOMAS J. COTE
Counsel for Defendant-Respondent Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc.
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Of Counsel
TOAZ, BUCK, MYERS, BROWER AND BERNST

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75—378

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs-Appellants,

against

JEROME A. AMBRO, Supervisor, RICHARD KINSELLA, THOMAS CASEY, LEONARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc.,

Defendants-Respondents.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK ENTERED UPON AN ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION OF RESPONDENT HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC., TO DISMISS APPEAL

Respondent Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc. moves that the appeal herein taken be dismissed on the ground that the appeal does not present a substantial federal question.

This is an appeal from a decision of the Court of Appeals of the State of New York which among other things, rejected appellants' contention that Chapter 62, Subdivision 49.01 of the Building Zone Ordinance of the Town of Huntington, which Chapter created the R-RM Retirement Community District, is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment.

I

Chapter 62, Subdivision 49.01 of the Building Zoning Ordinance of the Town of Huntington creating the R-RM Retirement Community District, does not violate the Equal Protection Clause of the Fourteenth Amendment.

Appellants concede that "financial aid and housing . . . for the elderly, . . . are worthy and legitimate government objectives in themselves relating to public health, safety, morals or general welfare". [Jurisdictional Statement pg. 9] Clearly, the governmental authorities have the power to regulate the land use to meet such legitimate objectives. It follows that to properly provide housing for the elderly, a governmental authority must also have the power to regulate the land use giving due regard to the user.

The ordinance in question does not limit the use of land to housing for the aged nor does it restrict the ownership of land so zoned to non-profit corporations. The ordinance specifically permits any use permitted in an R-80 Residence district which includes:

"(1) Single family dwellings

(2) Farm, nursery, truck garden, country estate

(3) Churches, temples, parish houses, convents, monasteries

(4) Public schools

(5) Private elementary and secondary schools [with certain restrictions]

(6) Library, museum or art gallery, conducted to serve primarily the residents of the Town and operated by a municipal agency or by a non-profit agency organized or chartered locally for the purpose.

(7) Town park, playground, athletic field, beach, bathhouse, marina, or other Town recreationed use.

(8) Municipal parking fields

(9) Fire station

(10) Municipal water supply reservoir, tank, standpipe, pumping station or filter bed, provided any tank or standpipe shall be set back . . ."

The ordinance in question could easily have been added to the Zoning Code of the Town of Huntington as an amendment by adding subdivision (2) of the R-RM District to the R-80 Residence District as a permitted use. However, to insure proper control over the use of the land, a separate zoning district was established. This permitted the municipality to control the "Height, Area and Bulk" of any building erected on land designated as R-RM.

This Court, in its decision in the case of *The State of Washington rel. Seattle Title Trust Company* v. *Roberge*, 278 U.S. 116, 49 S. Ct. 50, recognized the validity of a zoning ordinance which regulated the user and owner of a parcel of realty. In that case, the City of Seattle amended its zoning ordinance to provide, as a permitted use in the "First Residence District":

> "A philanthropic home for children or for old people shall be permitted in first residence district when

the written consent shall have been obtained of the owners of two-thirds of the property within four hundred (400) feet of the proposed building."

This Court held that the attempted delegation of power to two-thirds of the property owners within 400 feet was violative of the due process clause of the Constitution and struck down the ordinance in this regard and found that the trustee was entitled to have the building permit applied for. The Court at page 121 stated:

"Zoning measures must find their justification in the police power exerted in the interest of the public. Euclid v. Ambler Realty Co., supra, 387 of 272 U. S. (47 S. Ct. 118). 'The governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.' Nectow v. Cambridge, supra, page 188 of 277 U. S. (48 S. Ct. 448). Legislatures may not, under the guise of the police power impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385; Adams v. Tanner, 244 U. S. 590, 594, 37 S. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973; Meyer v. Nebraska, 262 U. S. 390, 399, 400, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446; Burns Baking Co. v. Bryan, 264 U. S. 504, 513, 44 S. Ct. 412, 68 L. Ed. 813, 32 A. L. R. 661; Norfolk Ry. v. Public Service Commission, 265 U. S. 70, 74, 44 S. Ct. 439, 68 L. Ed. 904; Pierce v. Society of Sisters, 268 U. S. 510, 534, 535, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468; Weaver v. Palmer Bros. Co., 270 U. S. 402, 412, 415, 46 S. Ct. 320, 70 L. Ed. 654; Tyson & Brother v. Banton, 273 U. S. 418, 442, 47 S. Ct. 426, 71 L. Ed. 718.

"[3, 4] The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance."

The Court continued, at pages 122-123:

"As the attempted delegation of power cannot be sustained, and the restriction thereby sought to be put upon the permission is arbitrary and repugnant to the due process clause, it is the duty of the superintendent to issue, and the trustee is entitled to have, the permit applied for."

An in depth analysis of the question of the constitutionality of such zoning in light of the Equal Protection Clause was made by Justice Morton B. Silberman in *Marino et al.* v. *Town of Ramapo, et al.*, 68 Misc. 2d 44, 325 N.Y.S. 2d 162, 183, wherein the Court, citing decisions of the United States Supreme Court, stated:

"Petitioners' further argument that the project being based on age and income classification amounts to a denial of the equal protection clause is singularly unimpressive in logic or authority.

"It has been held that a denial of equal protection occurs where there exists a systematic pattern of discrimination between classes of persons with no ra-

tional basis for differentiation (*Mtr. of Posner* v. *Rockefeller,* 31 A.D. 2d 352, 353, 297 N.Y.S. 2d 867, 868, affd. 25 N.Y. 2d 720, 307 N.Y.S. 2d 224, 255 N.E. 2d 563). On the other hand, there is no denial of equal protection if a reasonable relationship supports the classification and the purpose to be achieved (*McGowan* v. *Maryland,* 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393; *Allied Stores of Ohio* v. *Bowers,* 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480; *Matter of Bauch* v. *City of New York,* 21 N.Y. 2d 599, 606-607, 289 N.Y.S. 2d 951, 954, 237 N.E. 2d 211, 213, cert. den. 393 U.S. 834, 89 S. Ct. 108, 21 L. Ed. 2d 105). As our Court of Appeals recently stated:

" 'Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.' (Citing case.) Nor is the Constitution offended if the classification has some reasonable or rational basis. (Citing case.) Furthermore, '(a) statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' (Citing case.) (*People* v. *Ditniak,* 28 N.Y. 2d 74, 78, 320 N.Y.S. 2d 25, 27, 268 N.E. 2d 768, 769).

"Classifications predicated upon natural factors such as age and income have long been recognized as permissible in many legislative forms such as the social security, income tax, housing, welfare, labor, motor vehicle laws, selective service requirements, voting franchise requisites, etc. (see 16A *C.J.S. Constitutional Law* §§ 491, 498).

"Consequently, differentiation based upon age and income factors is permissible as long as it is rational and does not result in invidious discrimination (*Dandridge* v. *Williams,* 397 U.S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491; *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600). Classification does not offend the Constitution 'merely because it is not made with mathematical nicety, or because in practice it results in some inequality' (*Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78, 31 S. Ct. 337, 340, 55 L. Ed. 369).

"While it is the public policy of this State to assure every individual an equal opportunity for decent housing (*Center Management Co.* v. *State Div. of Human Rights,* 34 A.D. 2d 637, 309 N.Y.S. 885, affd. 27 N.Y. 2d 914, 317 N.Y.S. 2d 632, 265 N.E. 2d 926), it has been recognized that '(p)roviding low rental housing for persons with low income is a State concern' (*Matter of Fuller* v. *Urstadt,* 28 N.Y. 2d 315, 318, 321 N.Y.S. 2d 601, 603, 270 N.E. 2d 321, 323). The ends of this salutary policy may be achieved by the means employed herein, to wit: the construction of low-income housing for the poor and elderly; else how would these persons otherwise secure decent housing. . . .

"Accordingly, the court finds that the within classification is rational, adheres to established precedent, is in furtherance of the statutory and constitutional public policy of this State, promotes the Federal housing policy, does not constitute invidious discrimination and is not violative of the equal protection clause. Petitioners' complaint, which in reality relates to the existence of the project in their community (*Fletcher* v. *Romney,* 323 F. Supp. 189, *supra*), is more properly addressed to the Legislature rather than to the courts (*James* v. *Valtierra,* 402 U.S. 137, 91 S. Ct. 1331, 28 L. Ed. 2d 678, *supra* (April 26, 1971))."

In *Ferguson* v. *Skrupa,* 372 U.S. 726, 729, 731 83 S. Ct. 1028, this Court held:

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by

this Court to strike down laws which were thought unreasonable that is, unwise or incompatible with some particular economic or social philosophy.

"• • •

"The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned • • • with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' *Sporles* v. *Binford,* 286 U.S. 374, 52 S. Ct. 581."

II

Chapter 62, Subdivision 49.01 of the Building Zone Ordinance of the Town of Huntington is rationally related to a legitimate state and federal end and the means employed are rationally related to the pursuit of that end.

That housing for the aged is a matter of national concern was evidenced by the enactment by Congress of the "Senior Citizens Housing Act of 1962", *12 U.S.C.A. § 1701 (R)* wherein the need was stated clearly:

"The Congress finds that there is a large and growing need for suitable housing for older people both in

urban and rural areas. Our older citizens face special problems in meeting their housing needs because of the prevalence of modest and limited incomes among the elderly, their difficulty in obtaining liberal long-term home mortgage credit, and their need for housing planned and designed to include features necessary to the safety and convenience of the occupants in a suitable neighborhood environment. The Congress further finds that the present programs for housing the elderly under the Department of Housing and Urban Development have proven the value of Federal credit assistance in this field and at the same time demonstrated the urgent need for an expanded and more comprehensive effort to meet our responsibilities to our senior citizens."

This need is further stated in the "Older Americans Act of 1965", *42 U.S.C.A. § 3001,* where Congress stated:

"The Congress hereby finds and declares that, in keeping with the traditional American concept of the inherent dignity of the individual in our democratic society, the older people of our Nation are entitled to, and it is the joint and several duty and responsibility of the governments of the United States and of the several States and their political subdivisions to assist our older people to secure equal opportunity to the full and free enjoyment of the following objectives:

(1) An adequate income in retirement in accordance with the American standard of living.

(2) The best possible physical and mental health which science can make available and without regard to economic status.

(3) *Suitable housing, independently selected, designed and located with reference to special needs and available at costs which older citizens can afford.*

(4) Full restorative services for those who require institutional care.

(5) Opportunity for employment with no discriminatory personnel practices because of age.

(6) Retirement in health, honor, dignity—after years of contribution to the economy.

(7) Pursuit of meaningful activity within the widest range of civic, cultural, and recreational opportunities.

(8) Efficient community services, including access to low-cost transportation, which provide social assistance in a coordinated manner and which are readily available when needed.

(9) Immediate benefit from proven research knowledge which can sustain and improve health and happiness.

(10) Freedom, independence, and the free exercise of individual initiative in planning and managing their own lives." (Italics supplied)

The Congress recognized that the non-profit organization is a vital organ in effectuating this policy when it enacted the Housing and Urban Development of 1965, thereafter amended by the Housing and Urban Development Act of 1970, *12 U.S.C.A. § 1701b(h)(1)*, which states:

"(h) (1) For the purpose of assisting housing under this section on an experimental basis, subject to the limitations of this subsection, the term 'housing owner' (in addition to the meaning prescribed in subsection (b) of this section) includes—

'(A) a private nonprofit corporation or other private nonprofit legal entity, a limited dividend corporation or other limited dividend legal entity, or a cooperative housing corporation, which is a

mortgagor under a mortgage which receives the benefits of the interest rate provided for in the proviso in section 1715*l*(d) (5) of this title and which, after August 10, 1965, has been approved for mortgage insurance under section 1715*l*(d) (3) of this title and has been approved for receiving the benefits of this section;

'(B) a private nonprofit corporation or other private nonprofit legal entity which is a mortgagor under a mortgage insured under section 1715v(c) (3) of this title and which, after August 10, 1965, has obtained final endorsement of such mortgage for mortgage insurance and has been approved for receiving the benefits of this section; and

'(C) a private nonprofit corporation, a public body or agency, or a cooperative housing corporation, which is a borrower under section 1701q of this title and has been approved for receiving the benefits of this section: *Provided,* That, with respect to properties financed with loans under such section made on or before August 10, 1965, payments shall not be made with respect to more than 20 per centum of the dwelling units in any property so financed.

'(D) a private nonprofit corporation or other private nonprofit legal entity, a limited dividend corporation or other limited dividend legal entity, or a cooperative housing corporation, which is assisted under section 1715z—1 of this title and which has been approved for receiving the benefits of this section: *Provided,* That payments shall not be made with respect to more than 20 per centum of the dwelling units in any property so financed except that the foregoing limitation may be increased to 40 per centum of the dwelling units in any such property if the Secretary determines that

such increase is necessary and desirable in order to provide additional housing for individuals and families meeting the requirements of subsection (c) of this section.'"

Legislative power to provide for the aged as a part of its responsibility for the general welfare was clearly established by Mr. Justice Cardozo, speaking for the Supreme Court in *Helvering* v. *Davis,* 301 U.S. 619, 57 S. Ct. 904. Upholding the constitutionality of the Social Security Act, he stated:

"The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. *Home Building & Loan Association* v. *Blaisdell,* 290 U.S. 398, 442, 54 S. Ct. 231, 241, 78 L. Ed. 413, 88 A.L.R. 1418. Spreading from state to state, unemployment is an ill not particular but general, which may be checked if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the Steward Machine Co., supra, has set the doubt at rest. But the ill is all one or at least not greatly different whether men are thrown out of work because there is no longer work to do or because the disabilities of age make them incapable of doing it. Rescue becomes necessary irrespective of the cause. The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near.

"Congress did not improvise a judgment when it found that the award of old age benefits would be conducive to the general welfare. The President's Committee on Economic Security made an investigation

and report, aided by a research staff of Government officers and employees, and by an Advisory Council and seven other advisory groups. Extensive hearings followed before the House Committee on Ways and Means, and the Senate Committee on Finance. A great mass of evidence was brought together supporting the policy which finds expression in the act.

"Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here as often is with power, not with wisdom."

Article XVIII of the New York State Constitution, *McKinneys Constitution, Article XVIII, § 1,* adopted and approved in 1938 specifically empowers the legislature to provide for low rent housing for persons of low income.

In recognition of the need to provide suitable housing for the aged, among others, the New York State Legislature adopted the *Private Finance Housing Law.* Article II of this law established Limited Profit Housing Companies Law. *The Private Housing Finance Law,* Section 11, as amended, declares the public policy of the State of New York to be as follows:

"It is hereby declared that there exists in municipalities in this state a serious inadequate supply of safe and sanitary dwelling or non-housekeeping accommodations for families and persons of low income, including accommodations for handicapped persons of low income and aged care accommodations for aged persons of low income; that such conditions are due, in large measure, to overcrowding and concentration of the population, improper planning, excessive land coverage, lack of proper light, air and space, improper sanitary facilities and inadequate protection from fire hazards; that such conditions constitute an emergency and a grave menace to the health, safety, morals, wel-

fare and comfort of citizens of this state, necessitating speedy relief which cannot readily be provided by the ordinary unaided operation of private enterprise and require that provision be made by which private free enterprise may be encouraged to invest in companies regulated by law as to rents, profits, dividends and disposition of their property or franchises and engaged in providing such housing facilities and other facilities incidental or appurtenant thereto for families or persons of low income; that it is necessary that provision be made for participation by the state, its municipalities and the New York state housing finance agency in the financing of such housing, for the acquisition by such companies of real property required for such purposes and for public assistance to such companies by the granting of tax exemptions; that the cooperation of the state, its subdivisions and the New York state housing finance agency is necessary to accomplish such purposes; that the provision of such adequate, safe and sanitary housing accommodations by such companies jointly or severally are public uses and purposes for which public money may be loaned and private property may be acquired by and for such companies and tax exemptions granted; that such conditions require the creation of the companies hereinafter prescribed for the purpose of attaining the ends herein recited; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination."

The policy of the State of New York, when legislating in this area, was again set forth when the New York State Urban Development Corporation Act and the New York State Urban Development and Research Corporation Act were adopted.

McKinneys Unconsolidated Laws of New York § 6252 sets forth the legislative findings and purposes with respect to the New York State Urban Development Corporation and states, in part:

> "It is further found and declared that there continues to exist throughout the state a seriously inadequate supply of safe and sanitary dwelling accommodations for persons and families of low income. This condition is contrary to the public interest and threatens the health, safety, welfare, comfort and security of the people of the State . . ."
>
> "It is further declared to be the policy of the state to promote the safety, health, morals and welfare of the people of the state through the provisions of adequate, safe and sanitary dwelling accommodations and facilities incidental and appurtenant thereto for persons and families of low income . . ."

McKinneys Unconsolidated Laws of New York § 6302 sets forth the legislative findings and purposes with respect to the Corporation for Urban Development and Research of New York and states, in part:

> "a) a seriously inadequate supply of safe and sanitary dwelling accommodations within the financial reach of a substantial number of families and persons, including aged persons, living within the state; . . ."
>
> "The legislature hereby declares it to be the policy of this state to provide an adequate supply of safe and sanitary dwelling accommodations; . . . and to arrest the spread of deterioration and blight and promote the economic and physical development of such areas through the construction, reconstruction, rehabilitation and improvement of residential, commercial and industrial structures and facilities therein."

The Ordinance in question clearly bears a rational relationship to the ends to be achieved. As stated by this

Court in *McDonald* v. *Board of Election,* 394 U.S. 802, 808-809:

> "Though the wide leeway allowed the states by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, *and their statutory classifications will be set aside only if no grounds can be conceived to justify them.* See *McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U.S. 552 (1947); *Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61 (1911). With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U. S. 483, 489 (1955)."

See also *Tigner* v. *Texas,* 310 U.S. 141, 147 (1940), wherein this Court stated:

> "The equality at which 'the equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws' and laws are not abstract propositions. They do not relate to abstract units A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or in opinion to be treated in law as though they are the same."

Clearly it is the intent of the people of the nation and state under their respective Constitutions and the purpose and policy of the Congress and the state legislature to recognize the need to provide housing facilities for aged persons of low income. It is inconceivable that the Town Board does not have the legislative power to implement this purpose and policy at the very level at which such implementation is essential in order to be effective.

III

Conclusion.

The R-RM Retirement Community District Zone Ordinance of the Town of Huntington falls well within the permissible limits of local zoning authority long recognized by this Court. The contention that as applied to the Appellants, the Ordinance denies them equal protection of the laws in violation of the Fourteenth Amendment presents no substantial federal question. Respondent's Motion to Dismiss the Appeal should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-3781

ROBERT MALDINI, ROSE MALDINI, NEAL MARESCA, JULIA MARESCA, HAROLD MERCK, DOROTHY MERCK, PAUL DI MATTEO, FRED APREA, BLANCHE R. APREA, MANUEL MORENO, LAURA MORENO, JOHN SIMPSON and NINA SIMPSON,

Plaintiffs-Appellants,

—against—

JEROME A. AMBRO, Supervisor, RICHARD HORN and CLAYTON MUGRIDGE, as members of the Town Board, Town of Huntington, County of Suffolk, State of New York, and Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc.,

Defendants-Respondents.

ON APPEAL FROM A JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK ENTERED UPON AN ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEE, HEALTH CARE AGENCIES OF THE NEW YORK ANNUAL CONFERENCE OF THE METHODIST CHURCH, INC., TO DISMISS APPEAL

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Appellee, Health Care Agencies of the New York Annual Conference of the Methodist Church, Inc., moves to dismiss this appeal on the ground that no substantial federal question is presented.

I

A municipality's restriction of land ownership, operation and use to a particular class of persons presents a substantial federal question of equal protection of the law.

The question presented by the Appellants herein is a case of first impression for this Court. This is so because zoning has always been unalterably considered as ". . . the regulation by the municipality of the *use of land* within the community, *and of the buildings and structures* which may be located thereon, in accordance with a general plan and for the purposes set forth in the enabling statute". *Rathkopf, 4th Ed. 1975, the Law of Zoning and Planning, S. 1.01. The fundamental principle of zoning* is *regulation of land use* without regard to the identity of the owner or user at any given time (*ibid*, p. 1-21).

The basic error of the courts below and of the Appellees, as so clearly appears in its motion papers, consists in referring to the regulation of the owner, user and operator under the Town of Huntington's ordinance as a regulation of land use. (Appellee's Motion, Point I, page 2, ". . . the power to regulate the land giving due regard to the user"). All prior decisions have unanimously and universally held that such regulation of the owner, operator or user is an unauthorized exercise of the zoning power. *Abbadessa* v. *Board of Zoning Appeals*, 134 Conn. 28, 54 A 2d 675; *O'Connor* v. *City of Moscow*, 69 Idaho 37, 202, P 2d 401, 9 ALR 2d 1039 (1949); *Vhabos* v. *Little Boar's Head District*, 146 A 2d 257 (N. H. Sup. Ct. 1958); *Fox* v. *Johnson*, 275, N.E. 2d 637 (Ohio App.

1971); *Olevson* v. *Zoning Board of Review*, 71 R.I. 303, 44 A 2d 720; *Boulevard Scrap Co.* v. *Mayor and City Council of Baltimore*, 213 Md. 6, 10, 130 A 2d 743, 745 (1957); *Bridge Park Co.* v. *Borough of Highland Park*, 113 N.J. Super. 219, 273 A 2d 397 (A.D. 1971); *Maplewood Tenants Ass'n* v. *Maplewood Village*, 116 N.J. Super. 372, 282 A 2d 428 (Ch. Div. 1971); *Soho Park & Land Co.* v. *Board of Adjustment*, 6 N.J. Misc. 683, 142 A. 548 (1928); *Bernstein* v. *Village of Matinecock*, 60 M 2d 470, 302 S 2d 141 (1969); *Crow* v. *Brown*, 332 F. Supp. 382 (1971); *Women's Kansas City Soc'y* v. *City of Kansas City*, 58 F.2d 593 (1932); *Molino* v. *Mayor and Council of Borough of Glassboro*, 116 N.J. Super. 195.

The two more recent decisions in the State of New Jersey cited in Appellants' Jurisdictional Statement (p. 10), follow the universal and settled principle that zoning ordinances establishing districts giving due regard to the owner or user are illegal and void. *Taxpayers Association of Weymouth Township, Inc.* v. *Weymouth Township*, 125 N.J. Super. 376 (App. Div. 1973) 311 A 2d 187; *Shepard* v. *Woodland Township Committee and Planning Board*, 128 Super. 379 (Sup. Ct. Ch. Div. 1974) aff'd 135 N.J. Super. 97 (App. Div. 1975). In both cases zoning ordinances limiting occupancy to "senior citizens" were held unreasonable, arbitrary and discriminatory, in violation of the equal protection clause of the Fourteenth Amendment, since age has no realistic relationship to a recognized objective of zoning legislation.

Appellee's argument that the ordinance does not limit land use to the aged, nor restrict ownership to non-profit corporations organized in New York, is perhaps technically correct, but specious in effect. As the dissenting opinion so significantly pointed out in the Court of Appeals (Jurisdictional Statement, p. 10a, n.1), the practical and intended effect is to limit usage in this type of district to such retirement community. This fact is more

than amply demonstrated by the Town's own action in this regard.

The Town has adopted two Retirement Districts to date: the one involved in this appeal, and another in the Greenlawn area of the Town. Each consists of a twenty acre parcel on which can be constructed only the multiple dwelling units of the project, a community building, and the sewer and parking facilities required to service the community. There is no remaining space in either district on which to erect even one single family house, much less places of worship, schools, fire stations, and the like. This is substantial evidence that the practical and intended effect is to limit the districts to the retirement project.*

Appellee's argument in Point II of its motion is wholely irrelevant. The acts and statutes there cited have no relation to zoning. Article XVIII of the New York State Constitution empowers the *State* legislature to provide for *low rent housing for persons of low income.* Article XVIII has no application to zoning. The delegation of the zoning powers to towns is embodied solely in Town Law S. 261 (Appendix A, p. ....). That statute limits a town to regulation of the use of the land and the buildings and structures thereon.

Furthermore, the zoning ordinance involved here makes no reference whatever to persons of low income, to low rent housing, or to persons in retirement. Since zoning statutes have always been strictly construed, *440 East 102nd St. Corp.* v. *Murdock*, 285 N.Y. 298, 34 N.E. 2d 329 (1941); *Off-Shore Restaurant Corp.* v. *Linden*, 30 N.Y. 2d 160, 331 N.Y.S. 2d 397, 282 N.E. 2d 299 (1972); *Village of Stamford* v. *Fisher*, 140 N.Y. 187; Rathkopf,

* The Greenlawn parcel is the subject of an action now pending on appeal to the New York State Court of Appeals (*Biggs et al.* v. *Town of Huntington, et al.*).

4th Ed. 1975, *The Law of Zoning and Planning*, S. 9.01, and cases cited, it is quite clear that this ordinance by its own language is not designed for low rental housing, to providing housing for persons of low income, or to persons in retirement. Even age, as the record shows, is a factor left entirely to the discretion of the Appellee. There being no limitation on income or to retirement with regard to residency in this district, Appellee's continual references to such matters in its motion are totally without any factual or legal foundation, and designed solely to enlist the sympathy of the Court.

An ordinance such as this, which provides for a use restricted to certain members of the community seemingly based on age (a vague and undefined term whose interpretation is left entirely to the discretion of the Appellee), is invalid because: (1) it discriminates and denies equal protection of the law to persons similarly situated, and (2) bears no reasonable relationship to the purposes of the enabling act, i.e., to regulate the use of the land.

If *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 ALR 1016 (1926), presented a substantial federal question, then surely this case, involving as it does the establishment of an entirely new concept of zoning classification by a municipality acting wholly beyond the scope of its delegated powers and in contravention of all established and settled principles governing the power of land use restriction, presents an even more important issue for this Court's consideration and determination.

CONCLUSION

A substantial federal question having been presented and one of first impression, the court should deny appellee's motion to dismiss.

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APPENDIX

Town Law, S. 261

S. 261. GRANT OF POWER: APPROPRIATIONS FOR CERTAIN EXPENSES INCURRED UNDER THIS ARTICLE.—

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city; provided further, that all charges and expenses incurred under this article for zoning and planning shall be a charge upon the taxable property of that part of the town outside of any incorporated village or city. The town board is hereby authorized and empowered to make such appropriation as it may see fit for such charges and expenses, provided however that such appropriation shall be the estimated charges and expenses, less fees, if any, collected, and provided, that the amount so appropriated shall be assessed, levied and collected from the property outside of any incorporated village or city. Such regulations may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained.